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ALEXANDER L. STEVAS,
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83-1067

NO.

in the
Supreme Court
of the
United States

October Term, 1982

BILL MADDOX,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Must a Defendant in a criminal trial be forced to demonstrate "Actual Prejudice" when, through the actions of a trial court in denying a defense continuance requested in good faith, that Defendant is forced to stand trial in a lengthy, complex case represented by counsel retained on the morning of trial?

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THE OPINION BELOW

The opinion of the Court of Appeals is not reported, but appears in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 13, 1983. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 28, 1983. On November 25, 1983, Justice Sandra D. O'Connor, Circuit Justice for the Sixth Circuit, entered an order extending the time to file this petition until December 27, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE AND FACTS

On February 18, 1981, the petitioner and twenty-one others were charged in a thirty-count indictment filed in the United States District Court for the Western District of Tennessee, with conspiracy to possess with intent to distribute marijuana, possession with intent to distribute, and distribution of marijuana. The indictment alleged the existence of a network of marijuana distributors operations between Florida and Tennessee.

On August 10, 1981, it was learned that the petitioner and others were indicted in the Southern District of Florida. The petitioner was charged in the Florida indictment with conspiracy to import marijuana and with money laundering.[1]

After hearings on numerous pre-trial matters, trial in the instant case was scheduled to commence on Monday, October 19, 1981. It was learned on Friday, October 16, 1981, however, that the petitioner's retained counsel James Manire, was hospitalized for emergency heart surgery. Manire's young associate, James Reed, requested a continuance of trial, or in the alternative, a severance. This request was denied by the court.

On October 19, 1981, the petitioner's counsel in the Florida case appeared before the court in Memphis, Tennessee to renew the request for a continuance or severance. Counsel stated that he could be prepared within two weeks. It was also reported to the Court that the petitioner specifically objected to being represented by James Reed, who admitted to the Court that, in light of his *total lack of trial experience* he did not feel competent to try the case.

Expressing concern for docket control, the trial court again denied the requested continuance or severance, and presented the petitioner with the choice of being represented by the newly arrived counsel from Miami, or by Mr. Reed. Reluctantly, the petitioner chose to be represented by Miami counsel.

---

[1]The petitioner was subsequently acquitted on the conspiracy, and after two Juries were unable to reach a verdict on the money laundering case, the Government dismissed the charge.

After four weeks of trial, during which counsel repeatedly complained of the inadequacy of the time allowed for preparation, the jury found the petitioner guilty on all counts. The Court sentenced the petitioner to ten years each on Counts one and two, the sentences to run concurrently. In addition, the Court imposed fines totalling $90,000. In Counts three through thirty, the Court imposed sentence of five years on each count, concurrent with the sentence imposed in counts one and two. Finally, the Court imposed a special parole term of five years.

On appeal to the United States Court of Appeals for the Sixth Circuit, the petitioner presented, *inter alia*, the following issue:

> WHETHER THE TRIAL COURT'S ACTIONS IN DENYING THE DEFENDANT'S GOOD FAITH REQUEST FOR A CONTINUANCE OR SEVERANCE, THEREBY FORCING THE DEFENDANT TO TRIAL REPRESENTED BY COUNSEL RETAINED LESS THAN ONE DAY BEFORE TRIAL, DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHTS.

The petitioner presented a plethora of cases, including several from this Court, which compelled the conclusion that the petitioner was entitled to a new trial. The Government argued that since the petitioner could point to no specific prejudice as a result of the representation he received, the deprivation of counsel, if any, amounted to harmless error. The appellate court, apparently convinced by the Government's argument,

summarily, and rather cavilierly affirmed the petitioner's conviction. Similar treatment was given to petitioner's request for rehearing and rehearing *en banc*. This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents an issue of the highest constitutional magnitude, and, together with a case already pending before the Court, (*United States v. Cronic*, case no. 82-660) offers the opportunity to fashion standards by which to measure the effectiveness of counsel's assistance at trial, and to "flesh out" the skeletal and often conflicting definition of that Sixth Amendment right. While *Cronic* represented the plight of a criminal, defendant represented by a court-appointed attorney who specialized in real estate law, was unfamiliar with federal practice and had only twenty-five days to prepare his defense, the instance petitioner was, through no fault of his own, forced to proceed to a four-week trial represented by counsel, who, albert experienced, had literally *no* time to prepare a defense. In both cases, it is submitted, the Defendants were deprived of their Sixth Amendment right to counsel.

It is difficult to imagine a principle of law which at this juncture of American jurisprudence is more well settled than the fundamental and essential nature of the Sixth Amendment right to the assistance of counsel. Thus, it has been recognized that counsel is required when the accused is in custody, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); at post-indictment lineups, *United States v. Wade*,

388 U.S. 218 (1967); at certain probable cause or preliminary hearings, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Colelman v. Alabama*, 399 U.S. 1 (1970); at arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961); at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) at sentencing, *Mempa v. Rhay*, 389 128 (1967); on appeal *Douglas v. California*, 372 U.S. 353 (1963); *Entsminger v. Iowa*, 386 U.S. 748 (1967); during juvenile proceedings, *In re Gault* 387 U.S. 1 (1967); *Kent. v United States*, 383 U.S. 541 (1966); while in prison, *Wolff v. McDonnel*, 418 U.S. 539 1974); *Johnson v. Avery*, 393 U.S. 483 (1969); and during parole or probation revocation hearings, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). This Court has stated:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time judicial proceedings have been initiated against him.
>
> *Brewer v. Williams*, 430 U.S. 387, 398 (1977)

Of course, it has long been recognized that the Sixth Amendment entitles a criminal Defendant to more than mere representation; an accused has the right to the *effective* assistance of competent counsel. *Powell v. Alabama*, 287 U.S. 45, 58 (1932). The right to counsel is deemed so fundamental that infringement upon that right short of total deprivation requires reversal. As this Court stated in *United States v. Morrison*, 449 U.S. 361 (1981), interference with one's right to counsel

will warrant reversal so long as it "had or threaten[ed] some adverse effect upon the effectiveness of counsel's representation . . ." Thus, in *Geders v. United States*, 425 U.S. 80 (1976), this Court held that the trial court had committed reversable error in instructing the Defendant, who was on the witness stand, that he could not consult with his attorney during a seventeen hour overnight recess. Similarly, in *Herring v. New York*, 422 U.S. 853 (1975), a deprivation of counsel was recognized and reversal required when counsel was not permitted to give closing argument in a non-jury case.

Certainly, inadequate case preparation can derogate an accused's right to effective assistance of counsel. See *Powell v. Alabama*, *supra*. That is true whether the inadequacy is the result of a slothful or inexperienced lawyer, or, as in the instant case, the result of unreasonable time constraints imposed by the trial court. *See, e.g., United States v. Cronic*, *supra*; *United States v. Golub*, 638 F.2d 185 (10th Cir. 1980); *United States v. Olivas*, 558 F.2d 1366 (10th Cir. 1977).

In the instant case, the petitioner quite reasonably requested a continuance of his trial in light of the fact that his attorney had been admitted to the hospital for emergency heart surgery. The denial of that continuance left the petitioner the Hobson's choice of proceeding to trial represented by a mere neophyte attorney who had no trial experience, or by a more seasoned attorney whose initial appearance in the case was on the morning of trial and who had no knowledge of the facts of the case. A review of the case law compels the conclusion that the trial court acted improperly in denying the petition's requested continuance.

Although rulings on motions for continuance are traditionally left to the discretion of the trial court, "a judge is not imbued with the power to abrogate a criminal Defendant's constitutional rights." *United States of America v. King*, 664 F.2d 1171 (10th Cir. 1981). As noted in *Unger v. Sarafite*, 376 U.S. 575, 589 (1964):

> [A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.

See also United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978); *Linton v. Perini*, 656 F.2d 207 (6th Cir. 1981); *United States v. Johnson*, 318 F.2d 288 (6th Cir. 1963). As this Court forcefully stated in *Powell v. Alabama*:

> It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

Powell v. Alabama, *supra* at 59. Finally, as succinctly stated by the Fourth Circuit, when, as in the case *sub judice*, an attorney is employed one day or less before trial, it is incumbent upon him to request a continuance *and it is incumbent upon the Court to grant it. Stokes v. Peyton*, 437 F.2d 131 (4th Cir. 1970). *See also, Sykes v. Comm. of Virginia ex rel. Peyton*, 364 F.2d 314 (4th Cir. 1966). Given the complexities and sheer magnitude of the trial facing the instant petitioner, it cannot be reasonably argued that the trial court was correct in denying a continuance to the petitioner represented by counsel just off the plane from Miami, who was totally unprepared for trial.

Finally, it should be beyond cavil that the apparent holding of the Sixth Circuit in the instant case to the effect that the petitioner was not prejudiced by the trial court's actions is grossly in error. Without cataloging the substantial prejudice to the petitioner inherent in proceeding to trial in a complex case represented by counsel ignorant of the facts, suffice it to say that even if no prejudice could be demonstrated, reversal would be required. As the Tenth Circuit in *United States v. Cronic*, 675 F.2d 1126, 1128 (10th Cir. 1982) in a case now before this Court:

> [W]hen circumstances hamper a given lawyer's preparation of a Defendant's case, the Defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel . . . This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled be a reasonably diligent

> and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed.

In so holding, the Tenth Circuit was merely restating this Court's holding in *Glasser v. United States*, 315 U.S. 60, 76 (1941): "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Any notion that whether a denial of counsel constituted a denial of due process is a question to be tested by an appraisal of the totality of facts in a given case has been laid to rest by *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is now recognized that a deprivation of the right to counsel at trial can never be harmless error:

> Moreover, this Court has concluded that the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman v. California*, 386 U.S. [18] at 27. Accordingly, when a Defendant is deprived of the presence and assistance of his attorney either throughout the prosecution or during a critical state in, at least, the prosecution of a capital offense, reversal is automatic.

Holloway v. Arkansas, 435 U.S. 475, 489 (1978).

Indeed, infringement upon the right to counsel is *presumed* to be prejudicial. As Justice Brennan observed

in his concurring opinion in *Dickey v. Florida*, 398 U.S. 30, 54-55 (1970):

> Within the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel, confrontation, public trial, an impartial jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process. Because potential substantial prejudice inheres in the denial of any of these safeguards, prejudice is usually assumed when any of them is denied. Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice must be assumed, or constitutional rights will be denied without remedy.

In light of the trial court's actions in unreasonably denying the Defendant's requested continuance or severance, which request was made in good faith and not for the purposes of delaying trial, but which was made only to afford counsel an opportunity to prepare for trial, it is clear that the petitioner has suffered a substantial deprivation of his Sixth Amendment rights and his conviction should be reversed. More importantly from this Court's standpoint, because of the potential broad impact of this case and that of *United States v. Cronic*, *supra*, on the criminal justice system, this Court should grant its writ of certiorari.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinions of the Sixth Circuit.

Respectfully submitted,

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Appendix

82-5063, 82-5185, 82-5199
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

DONALD E. RAULERSON, DONNIE RAULERSON, and BILL MADDOX

ORDER

BEFORE: EDWARDS, Chief Circuit Judge, ENGEL, Circuit Judge, and BERTELSMAN, District Judge.*

On receipt and consideration of appeals in the above-styled cases and on consideration of the lengthy record of this trial and finding therein more than ample evidence of the defendants' guilt on charges of conspiracy to distribute and distribution of thousands of pounds of marijuana; and finding in this record no improper joinder of separate conspiracies in a single trial, nor any reversible error in the admission of certain tape recordings made in Miami, not any deprivation of counsel in the trial court's denial of continuance or severance to defendant Maddox; and finding further that the evidence in this case as to all three defendants constituted overwhelming support for the jury's guilty verdicts;

Now therefore, the judgments of convictions are affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A TRUE COPY

Attest:
JOHN P. HEHMAN, Clerk
By [illegible]
Deputy Clerk

ISSUED AS MANDATE: OCTOBER 10, 1983
COSTS: NONE

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*Honorable William O. Bertelsman, District Judge, U.S. District Court for the Eastern

No. 82-5185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BILL MADDOX,
Defendant-Appellant.

ORDER

Before: EDWARDS, Chief Judge, ENGEL, Circuit Judge, and BERTELSMAN,* District Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's order,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the Court
/s/ John P. Hehman
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-402

BILL MADDOX,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 27, 1983.

/s/ Sandra D. O'Connor

Associate Justice of the
Supreme Court of the
United States

Dated this 25th day of November, 1983.

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CLERK

No. 83-1067

In the Supreme Court of the United States

OCTOBER TERM, 1983

BILL MADDOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITON

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QUESTION PRESENTED

Whether the district court's denial of petitioner's motion for a continuance due to the illness of his retained counsel deprived him of effective assistance of counsel, even though petitioner was represented at trial by another experienced lawyer who was representing him on closely related charges and assisted by a second lawyer who was thoroughly familiar with the charges in the instant case.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1067

BILL MADDOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITON

OPINION BELOW

The order of the court of appeals (Pet. App. 1-2) is reported at 716 F.2d 905 (table).

JURISDICTION

The judgment of the court of appeals was issued on July 13, 1983. A petition for rehearing was denied on September 28, 1983 (Pet. App. 3). On November 25, 1983, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 27, 1983 (Pet. App. 4), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on 29 counts of possession of marijuana with intent

to distribute, in violation of 21 U.S.C. 841(a)(1), and conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms totaling 10 years' imprisonment, a $90,000 fine, and a five-year special parole term.[1] The court of appeals affirmed (Pet. App. 1-2).

1. Briefly summarized, testimony of former drug distributors who had operated in the Memphis, Tennessee, area showed that, beginning in the spring of 1980, they would travel to Fort Pierce, Florida, for the purpose of obtaining marijuana for resale. There they would go to the home of co-defendant Donald Raulerson, where they would purchase large quantities of marijuana (sometimes exceeding a ton) from petitioner, Raulerson, and his son, Donnie Raulerson. On some occasions, the purchasers would deal directly with petitioner; on other occasions, petitioner would load and weigh the marijuana, which he stated had been smuggled into the United States from Colombia . See, *e.g.*, Tr. 804, 818-820, 824, 826-827, 831, 843, 1384, 1832-1836, 1880. In addition to the testimony of co-conspirators in the distribution scheme, the government presented video tapes made by an undercover FBI agent who conducted an enterprise in Miami that was ostensibly in the business of laundering the proceeds of illicit drug sales (Tr. 2178). The tapes showed petitioner and his co-defendants transferring a large amount of money in exchange for a cashier's check payable to the executor of a fictitious estate and recorded conversations concerning the disposal of the proceeds of marijuana sales (Tr. 2187-2194, 2239-2244).

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[1]Co-defendant Donald Raulerson also was convicted on 29 substantive marijuana trafficking counts and a conspiracy count. He was sentenced to 13 years' imprisonment, and fines totaling $200,000. Co-defendant Donnie Raulerson was convicted on the conspiracy count and sentenced to three years' imprisonment.

2. Petitioner and his co-defendants were indicted on February 18, 1981. They were arraigned on March 4 and the case was set for trial on April 27, 1981. However, on the motion of petitioner and the co-defendants, the trial date was repeatedly continued: first to June 29, then to August 31, September 28, and finally October 19, 1981. See, *e.g.*, 6/18/81 Tr. 5; 6/26/81 Tr. 15.

On August 10, 1981, a grand jury sitting in the Southern District of Florida indicted petitioner and Donald Raulerson on charges involving the importation of marijuana and money laundering. The charges resulted from the same course of conduct that gave rise to the charges pending in the Western District of Tennessee. See 8/10/81 Tr. 8-9. The trial on the Florida indictment was scheduled for December 14, 1981 (10/16/81 Tr. 7).

From the inception of the instant proceedings, petitioner was represented by James Manire and his associate, James Reed. The two had planned that Manire, an experienced trial attorney, would be the lead counsel at trial and that Reed, who had not previously conducted the defense at a jury trial, would prepare and argue motions and conduct legal and factual analysis. See 10/16/81 Tr. 4-5; 10/19/81 Tr. 10-11. Accordingly, during numerous hearings on pretrial motions, petitioner was represented almost exclusively by Reed. During these hearings, Reed argued, inter alia, that the defense should be permitted the opportunity to interview informants; that several of the charges were multiplicitous; and that, because the Florida and Tennessee indictments involved the "same transaction," trial on both would violate the Double Jeopardy Clause. Additionally, he succeeded in obtaining the exclusion of portions of the video tapes that the government intended to introduce into evidence at trial. See 4/30/81 Tr. 24-25; 8/10/81 Tr. 2, 29-30; 9/18/81 Tr. 7, 24-25, 42-44; 9/30/81 Tr. 248-348.

On Thursday, October 15 — three days before the trial was scheduled to begin — Reed informed the court that Manire had suffered a heart attack, would have to undergo a coronary by-pass operation, and would not be available to participate in a trial for several months (10/16/81 Tr. 6-7). Reed asserted that Manire's illness would preclude his serving as lead counsel; that petitioner objected to proceeding in Manire's absence; and that he (Reed) lacked trial experience. Reed accordingly moved for a continuance or severance of the case from that of the co-defendants (*id.* at 4-6). The district court denied the motion after a hearing on the next day, observing that the case already had been continued repeatedly at the request of petitioner and the co-defendants, that the co-defendants objected to further continuances, and that, because of the pending Florida trial, a continuance of the length necessary to permit Manire's recovery would delay the trial until the following February (*id.* at 12, 20). After suggesting that petitioner make arrangements to obtain another attorney to assist Reed at trial, the court made the following finding (*id.* at 20):

> The records would reflect that Mr. Reed has participated fully, that he has performed certainly more than adequately in respect of the legal motions and the legal positions that have been presented before the court on behalf of [petitioner]. That Mr. Reed is fully and entirely cognizant of the details and the circumstances and the only basis that the court has any real problem about it is Mr. Reed's proper and appropriate assertion to the court that he has not had the experience before in jury trials.

The court also invited petitioner to renew the motions during trial in the event that he found a concrete need for a continuance or severance and stated that, in the event of petitioner's conviction, it would grant a new trial if it appeared that he was prejudiced by denial of the motions (*id.* at 18-19).

On October 19, 1981, Edward O'Donnell, an experienced Florida trial attorney who specialized in defending drug cases, appeared on petitioner's behalf (10/19/81 Tr. 7, 22). After introducing himself as the attorney representing petitioner in the "related case in Florida," O'Donnell requested a two-week continuance for the purpose of preparing to defend petitioner (*id.* at 12, 14). The court denied the request, observing that O'Donnell would be familiar with the evidence in the case, and particularly the video tapes, as the result of his representation of petitioner in Florida (*id.* at 31-33). However, to assure O'Donnell adequate preparation time, the court stated that it would permit him to cross-examine the government's witnesses last of the three defense attorneys or to recall them after they had completed their testimony, and also that he could delay making an opening statement until the beginning of petitioner's case (*id.* at 34-35). Preliminary matters and the government's opening argument thereafter consumed the entire first week of trial, and there was no cross-examination of any government witness until Wednesday of the second week of trial (Tr. 38-689, 800, 1190). Reed served as co-counsel throughout the trial proceedings.

Following petitioner's conviction, neither O'Donnell nor Reed moved for a new trial on the ground that they were impeded in their ability to afford petitioner adequate representation due to the denial of the continuance motions. Instead, on direct appeal, O'Donnell argued that, even absent a showing of prejudice, refusal to grant the continuance resulted in the denial of effective assistance of counsel and required reversal of the conviction (Br. 5-13). The court below summarily rejected this claim, noting in addition that "the evidence in this case * * * constituted overwhelming support for the jury's guilty verdict" (Pet. App. 1).

ARGUMENT

Petitioner contends (Pet. 4-10) that denial of his motion for a fifth continuance, sought because of the illness of lead trial counsel, constituted a denial of his Sixth Amendment right to effective assistance of counsel and requires reversal of his conviction even without a showing of prejudice. This claim is clearly without merit.

As this Court recently observed in *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9-10 (citations omitted):

> Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to assistance of counsel.

See also *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *United States* v. *Phillips*, 640 F.2d 87, 92-93 (7th Cir.), cert. denied, 451 U.S. 991 (1981).

In this case, the district court's denial of a continuance did not constitute "an unreasoning and arbitrary 'insistence upon expeditiousness' " (*Morris* v. *Slappy*, slip op. 9-10 (quoting *Ungar* v. *Sarafite*, 376 U.S. at 589)). Reed, who acted as co-counsel throughout the trial, had been closely involved with the case since the return of the indictment and was fully conversant with the facts and pertinent law. Any

lack of trial experience on his part[2] was offset by the appearance of O'Donnell, a seasoned trial attorney who also was conversant with the petitioner's circumstances due to his representation of petitioner on the related Florida charges. Additionally, the trial court made special provisions to assure that O'Donnell had adequate preparation time by permitting him to defer cross-examination of government witnesses and presentation of his opening argument.[3] Indeed, due to the length of the preliminary stages of the trial, the government's presentation of its case did not begin until 10 days after the court denied O'Donnell's request for a continance (Tr. 800).

Moreover, the court previously had granted continuances at the request of petitioner and his co-defendants that resulted in the delay of the trial from April until October 1981. The additional continuance of two weeks requested by O'Donnell might well have had the practical effect of further delaying the trial for approximately three months, due to the proceeding's anticipated length and the scheduled commencement of petitioner's trial in Florida on December 14 (10/19/81 Tr. 32-33). In view of these factors and protections, denial of the continuance motion was a proper exercise of the court's broad discretion.

Moreover, as the Court held in *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940), "[s]ince the Constitution nowhere specifies any period which must intervene between the

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[2]Of course, lack of trial experience, standing alone, does not constitute a basis for a claim of ineffective assistance of counsel. U.S. Br. at 39-41, U.S. Reply Br. at 3-5, *United States* v. *Cronic*, No. 82-660 (argued Jan. 10, 1984). See, *e.g.*, *United States* v. *Badolato*, 701 F.2d 915, 926 (11th Cir. 1983); *Harris* v. *Housewright*, 697 F.2d 202, 205 (8th Cir. 1982); *United States* v. *Easter*, 539 F.2d 663, 666 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977).

[3]O'Donnell nevertheless chose to make his opening statement at the outset (Tr. 755).

required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied does not constitute a denial of the constitutional right to assistance of counsel." The Court therefore has refused to fashion the per se rule suggested by petitioner "requiring reversal of every conviction following tardy appointment of counsel" (*Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970)), and it has made clear that a defendant presenting such a claim is not entitled to relief absent a showing of prejudice as the result of the timing of the substitution of counsel and trial. *Ibid.* See also *Avery* v. *Alabama*, 308 U.S. at 450. In this case, petitioner's counsel were specifically invited by the district court to present in a post-trial motion any claims they might have relating to inadequate representation due to insufficient preparation time, but they did not do so. Instead, petitioner merely claimed on appeal that denial of the motion was prejudicial per se and that reversal of his conviction was required. Absent any showing whatsoever of specific prejudice, however, petitioner is not entitled to relief. See *Chambers* v. *Maroney*, 399 U.S. at 53-54. See also U.S. Br. at 33-34 & App. 7a-10a, *United States* v. *Cronic*, No. 82-660 (argued Jan. 10, 1984).[4]

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[4]We have furnished petitioner with copies of our briefs in *Cronic*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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